1999 WL 34807517 (La.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Louisiana,
Fourth District Court.

Mary Louise HOGUE, Russell Gordon Hogue and David Ray Hogue,

v.

Dr. Randy SUSSMANE-STUBBS and Western Indemnity Insurance Company.

No. 98-2470.
April 21, 1999.

Memorandum in Support of Motion for Additur and/or Judgment Notwithstanding the Verdict and, in the Alternative, for New Trial

Law Offices of Richard L. Fewell, Jr., 1315 Cypress Street (71291), Post Office Box 1437, West Monroe, LA 71294, (318) 388-3320, Richard L. Fewell, Jr.

MAY IT PLEASE THE COURT:

Statement of the Case:

This matter was tried before a jury of twelve on March 8 - 11, 1999 in Ouachita Parish, with the Honorable Benjamin Jones presiding. After much deliberation, the jury returned a verdict in favor of the plaintiffs and against the defendants as follows:

> 1. Do you find, from a preponderance of the evidence, that the treatment rendered to Gordon Hogue, by Dr. Randy Stubbs, fell below the standard of care ordinarily practiced by Emergency Room physicians under similar circumstances and that this breach in the standard of care was the proximate cause or a contributing cause of his death and the damages sustained by the plaintiffs?

Yes X No.....

***If your answer to question 1 is No, then stop, you have reached a verdict. Have the foreperson sign and date this form as provided and tell the bailiff that you are ready to return to the court room.

***If your answer to Question I is Yes, please answer Questions No. 2, 3 and 4.
2. Do you find from a preponderance of the evidence that Gordon Hogue was himself at fault in a manner which contributed to his death?

Yes X No.....

3. In what percentages do you allocate fault to Dr. Stubbs and Mr. Hogue (Total must equal 100%)?

Dr. Stubbs 48 % Mr. Hogue 52 %

4. Without regard to percentages of fault, what amount of money will fairly compensate the plaintiffs for:
A. Loss and deprivation of companionship, love and affection, assistance, and mental anguish to:

	Mary Louise Hogue	$ 81,250
	Russell Gordon Hogue	$ 17,000
	David Ray Hogue	$ 17,000
B.	Loss of support for Mary Louise Hogue	$ 135,000
C.	Funeral Expenses	$??

DATE:..... .....

FOREPERSON

There are obvious defects with the verdict which require correction. A judgment was signed by this Honorable Court on the 15th day of April 1999 which triggered the delays for filing this Motion and Memorandum in Support of Same. Your movers respectfully pray for the relief sought herein.

The Applicable Law

Additur

LSA CCP Art. 1814 provides as follows:
If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Miller v. Chicago Insurance Company, 306 So. 2d 355 (La.App. 3 Cir. 1975)

> "Additur or remittitur are devices to be used, in our opinion, sparingly and with restraint. However, where the trial judge, who has seen and heard the witnesses and the other evidence concludes that the award is so inadequate or so excessive that he would order a new trial, then his action in offering the parties an adjustment in the award is proper."

Miller v. Chicago Insurance Company, 320 So. 2d 134 (La. 1975)

> "The Louisiana statutory scheme requires the consent of the party adversely affected by an additur or remittitur. The party is offered an opportunity, when asked by the trial judge, to agree to a change in the judgment, thereby avoiding the expense and delay of a new trial. The order of an additur or remittitur is therefore contingent; if the party does not agree to the change, he elects to submit to a new trial. Therefore,

> in consenting to the additur or remittitur, a party in effect agrees to promote judicial efficiency by binding himself to a fixed quantum."

Ryals v. Home Ins. Co., 410 So. 2d 827 (La. App. 3d Cir. 1982)

"We recognize that, under *Coco v. Winston Industries*, 341 So. 2d 332 (La. 1977)' " ...before a Court of Appeal can disturb an award made by a trial court that the record must clearly reveal that the trier of fact **abused** its discretion in making its award. (Citations omitted) Only after making the finding that the record supports that the lower court **abused** its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest)point which is reasonable within the discretion afforded that court."

Motion for New Trial

LSA CCP Art. 1972 provides, in pertinent part, as follows:

A new trial shall be granted, upon contradictory motion of any party, in the following cases:

> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.

LSA CCP Art. 1973 provides as follows:

> A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law.

Motion for Judgment Notwithstanding the Verdict

LSA CCP Art. 1811 provides, in pertinent part, as follows:
B. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or render a judgment notwithstanding the verdict.

F. The motion for a judgment notwithstanding the verdict may be granted on the issue of liability or on the issue of damages or on both issues.

Barfield v. Jacobs, 527 So. 2d 555 (La. App. 3 cir. 1988)

"A jury award of damages which is below the lowest amount which could reasonably have been awarded under the evidence is an error specifically remedied by LSA-C. C. P. art. 1811 through judgments N. O. V...."

"The standard for increasing a jury's award of damages in a J.N. O. V. is set forth in *Scott v. Hospital Service District No. 1*, 496 so. 2d 270 (La. 1986):
When there is a jury, the jury is the trier of fact. LSA-C. C.P. art. 1736. The rules governing a motion for judgment notwithstanding the verdict are found in LSA-C. C.P. art. 1811. The article does not specify the grounds on which the trial judge may set aside a jury verdict. The Official Revision Comments state that '...a judgment N. O. V. is based on a different standard [from additur or remittitur]-namely, that based on the evidence there is no genuine issue of fact. Thus where the trial court is convinced that, under the evidence, reasonable minds could not differ as the amount of damages [or as to liability], it should have the authority to grant the appropriate judgment notwithstanding the verdict."

ARGUMENT

There are three areas or error in the verdict: funeral expenses, general damages for the two boys, and lost wages or support for Ms. Hogue. They will be addressed below.

General Damages for the Boys:

The first thing that sticks out to this writer is that the jury never looked at the photo album of the family. Without looking at this evidence, how can they know what the true relationship of the family was, and now is? Prior to considering this Motion, it is respectfully requested that the photos be reviewed.

As noted on the verdict form, the jury awarded $17,000.00 each to the two major sons of Mr. Hogue. This is clearly an **abuse** of discretion. The following jurisprudence is offered as an aid to the court to determine a proper award and to determine that, in fact, the jury did **abuse** its discretion.

Bertrand v. Bollich, 695 So. 2d 1384 (La. App. 3d Cir 1997) "The jury awarded Penny Bertrand Belard and Jude Glenn Bertrand $15,000.00 each for past, present, and future mental anguish in connection with the death of their mother. They contend that this award is an **abuse** of the jury's discretion and suggest that an award of at least $150,000.00 each is appropriate.

We agree that the jury **abused** its discretion in its award of general damages. At the time of the accident, Ms. Stelly was in her late fifties, Penny was thirty-two years old, and Jude was twenty-nine years old. Ms. Stelly was the only parent that Penny and Jude grew up with. Although Ms. Stelly suffered from depression as Penny and Jude were growing up, she obtained relief through medication about ten years prior to the accident, and Penny testified that they "finally had their mother back." The record reveals that Ms. Stelly was very involved in the lives of her children and grandchildren, frequently spending time with them and being attentive to their needs. Ms. Stelly went on vacations with Penny, and Penny considered her mother to be her best friend and a confidant. Jude considered his mother to be his friend. He testified that she "was all [he] had," that they were close, and that he sought her advice on almost everything. Additionally, Ms. Stelly was Jude's "fishing buddy." Penny described her mother's death as a "[t]otal loss."

In light of the extremely close, nurturant, and supportive relationship Penny and Jude had with their mother, the only parent with whom they had a relationship, we find that an award of $70,000.00 each was the lowest amount reasonably within the jury's discretion."

Bannerman v. Bishop, 688 So. 2d 570 (La. App. 2 Cir. 1996)

Although Mrs. Bannerman's (she was 81 at death) sons were grown and had moved away from home, the decedent managed to maintain a close and supportive relationship with each of them. All three sons testified at trial regarding the loss they sustained as a result of the death of their mother. We award plaintiffs, Ward Bannerman, Dempsey Bannerman and Paul Storey, $100,000 each for the wrongful death of their mother."

Jones v. St. Francis Cabrini Hospital,, 652 So. 2d 1331 (La. 1995)

$100,000 each to the major children for the wrongful death of an **elderly** parent.

Gordon v. Willis Knighton Medical Center, 661 So. 2d 991 (La. App. 2 Cir 1995)

$100,000 and $125,000 to the major children for the wrongful death of an **elderly** parent.

Faces v. Terrebonne Parish Consolidated Government, 625 So. 2d 683 (La. App. 1st Cir. 1993)

$100,000 and $110,000 the major children for the wrongful death of an **elderly** parent.

Riser v. American Medical International, Inc., 620 so. 2d 372 (La. App. 5th Cir. 1993)

$150,000 to the major child for the wrongful death of an **elderly** parent.

Rick v. State, Through Dept. Of Transportation and Development, 619 So 2d 1149 (La. App. 1st Cir 1993)

$150,000 to the major child for the wrongful death of an **elderly** parent.

As this Honorable court can readily see, the jury **abused** its much discretion in awarding these two young men $17,000 each. Their relationship was very close. They watched movies together, worked on projects together, went on family vacations together and worshipped together. Even David maintained a close relationship with his Dad despite the distance to David's new home. Mr. Hogue even sold his motor home to pay for David's law school. He participated in scouts and was a proud band parent, both in High School and in College. It is respectfully submitted that the lowest amount that the jury could award is $100,000 each in general damages to the sons. The representative cases above are several years old and represent the wisdom of several circuits, as well as the Supreme Court.

FUNERAL EXPENSES

As this Court will recall, the jury likewise did not award Ms. Hogue any damages for the funeral expenses, despite same being uncontroverted at trial. Wrongful death damages include the elements of loss of love and affection, loss of services, loss of support, medical expenses and funeral expenses. *Odom v. State, Dept. Of Transportation and Development,* 688 so 2d 1082 (La. App. 3 Cir 1996). In the instant case, funeral damages were established to be $8,244.90. Therefore, this amount should be added to the jury's verdict, either by additur or JNOV.

LOSS OF SUPPORT

In the instant case the only economist to testify at trial was Dr. Ernest Moser. He testified unrebutted on behalf of the plaintiffs and he itemized the loss of support as follows:

> The total past economic loss resulting from the Mr. Hogue's death totals $99,373.12, of which $88,609.33 results from the net loss of his income to the household, while $5,168.32 results from the loss of his services to the household, and $5,595.47 is the value of reduced retirement benefits.

Dr. Moser also testified about the loss of future support. He calculated this to be $253,085.38 which includes deductions for his personal consumption, present day value, and a 3% discount rate.

The evidence likewise established that Mr. Hogue's lost services to the household equal $30,256.88 and his lost fringe benefits equal $15,981.74.

The total economic loss resulting from Mr. Hogue's death is the sum of the net past loss and the net future loss. Therefore, the total economic loss is $398,697.12 ($99,373.12 net past loss of income, household services, and fringe benefits plus $301,036.91 net future loss.

In *Odom*, supra, the Court of Appeal reversed the trial court on the issue of liability and held as follows relative to loss of support:

> "Uncontoverted evidence introduced at trial established that the Odoms' loss of support, in terms of Mr. Odom's future wages, totaled $89,501.00. Accordingly, we find that the Odoms are entitled to that amount."

In this particular case, the defendant's did not rebut the evidence offered by Dr. Moser. They did not call an economist of their own. He was not impeached with his calculations. His testimony was accepted as that of an expert by the Court.

It is therefore an **abuse** of discretion for the jury to reduce the loss of support claim to $135,000. There was no basis for this. There was no suggestion that anything other than the figure proposed by Dr. Moser was correct. Clearly the jury **abused** its discretion in awarding less support damages than that suggested by Dr. Moser.

The Fifth Circuit Court of Appeal was faced with a nearly identical situation. In *Fleming v. Smith*, 638 So 2d 467 (La. App. 5 Cir 1994) the jury awarded the plaintiff only $10,000 in lost wages despite uncontroverted evidence of lost wages of $30,000. The Court of Appeal granted the additur and stated:

> "We agree that a claim for lost wages need not be proved with mathematical certainty, and only requires such proof as reasonably establishes the claim; this proof may consist of the plaintiff's own reasonable testimony. *Burns v United Gas Pipeline Co.*, 598 so 2d 397 (La. App. 4 Cir. 1992); *Austin v. Pascarelli*, 612 So 2d 201 (La. App. 4 Cir. 1992). This testimony must be accepted as truthful, absent contradiction or impeachment. See *Partner v. Anderson*, 513 So. 2d 471 (La. App. 2d Cir. 1987) After considering the record herein in connection with the jurisprudence, we find it was not reasonable for the jury to conclude the plaintiff only lost $10,000 in past wages, and the weight of the evidence proves a much greater loss. The trial judge therefore did not **abuse** his discretion in increasing the award to $30,000.00"

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